UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN

UNITED STATES OF AMERICA,

Plaintiff,

And

NATURAL RESOURCES DEFENSE COUNCIL, INC. AND SIERRA CLUB,

Intervenor-Plaintiffs,

v.

DTE ENERGY COMPANY AND DETROIT EDISON COMPANY,

Defendants.

Civil Action No.
2:10-cv-13101-BAF-RSW

Judge Bernard A. Friedman

Magistrate Judge R. Steven Whalen

PLAINTIFF'S OPPOSITION TO DEFENDANTS' MOTION FOR PROTECTIVE ORDER

ISSUES PRESENTED

Pursuant to Local Rule 7.1(d)(2), the issue presented by DTE's motion is whether the Clean Air Act's statutory notice requirement is satisfied where EPA has specified the unit, regulation, and outage violating the law and the company understood the scope of the project.

Plaintiff submits that the notice was sufficient.

The leading authority supporting Plaintiff's argument is set forth on the next page.

LEADING AUTHORITY FOR THE RELIEF SOUGHT

Statute

42 U.S.C. § 7413(a)(1)

Case Law

Navistar Intern. Transp. Corp. v. U.S. EPA, 858 F.2d 282 (6th Cir. 1988)

United States v. B & W Inv. Props., 38 F3d 362 (7th Cir. 1994)

United States v. AM General Corp., 808 F. Supp. 1353 (N.D. Ind. 1992)

United States v. BP Exploration & Oil Co., 167 F. Supp. 2d 1045 (N.D. Ind. 2001)

United States v. Brotech Corp., No. Civ. A. 00-242 8, 2000 WL 1368023 (E.D. Pa. Sept. 19, 2000)

United States v. Chevron U.S.A., Inc., 380 F. Supp. 2d 1104 (N.D. Cal. 2005)

United States v. Ford Motor Co., 736 F. Supp. 1539 (W.D. Mo. 1990)

United States v. Louisiana-Pacific Corp., 682 F. Supp. 1141 (D. Colo. 1988)

United States v. LTV Steel Co., Inc., 116 F. Supp. 2d 624 (W.D. Pa. 2000)

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INTRODUCTION

Defendants seek a ruling that would make half of the renovation work performed during the Spring 2010 outage off limits for discovery. All the work was performed during a single outage at Monroe Unit 2 as part of a comprehensive $65 million "extreme makeover." Nothing in the law or the facts of this case can justify DTE's attempt to shield half of this overhaul from discovery.

First, there is no basis for a protective order here because the United States' June 4, 2010 Notice of Violation ("NOV") explicitly included the entire scope of work for the Spring 2010 outage. Second, Defendants' own statements show that they well understood that the scope of the NOV encompassed all of the work conducted during the Spring 2010 outage. Such contemporaneous actual notice is sufficient to meet the Clean Air Act's requirements. Finally, even if the June 2010 NOV were not clear, and even if Defendants had not contemporaneously conceded that they understood its scope, Defendants' new arguments about the sufficiency of the notice should be rejected as an unwarranted delay tactic that this Court has ample discretion to reject. The remedy for any alleged insufficiency of the NOV would be for EPA to simply send DTE a new notice advising the company of what it already knows: that the alleged violation in this case encompasses the $65 million renovation project constructed during the Spring 2010 outage at Monroe Unit 2. There is no basis for DTE's claimed technical deficiency to preclude discovery in this case.

Indeed, Defendants' motion appears to be nothing more than a tactical ploy to protect what is left of their routine maintenance defense, as discussed in Section III below. As has been previously briefed by the parties, to meet its burden to invoke this defense, Defendants must show that the nature, extent, purpose, frequency, and cost of the alleged modification are such

that it can be considered "routine" maintenance under EPA's narrow exclusion to PSD liability. Throughout the litigation, Plaintiff has repeatedly stressed the cost, scope, and other factors of the entire $65 million overhaul as a whole. DTE itself also regularly referred to the outage work as a single "project" before the case was filed and in the early stages of the litigation. During the preliminary injunction hearing, Defendants' counsel acknowledged that the United States had addressed the entire project. It was only after Plaintiff pointed out that Defendants had failed to develop an argument addressing the real question – whether the $65 million overhaul was routine maintenance when considered as a whole – that Defendants began to complain about the alleged scope of the NOV. Made aware of the vulnerability of their argument, Defendants are now attempting to carve the project into pieces in order to make them seem smaller for purposes of their routine maintenance defense. Whatever the ultimate merits of such a tactic,[1] Defendants should not be allowed to block discovery into the very facts of the project.

Accordingly, Plaintiff respectfully requests that Defendants' motion be denied and that DTE be ordered to provide the information – which was requested through discovery on January, 28, 2011 – on an expedited basis.

ARGUMENT

I. The NOV Covers The Entire Spring 2010 Outage

DTE's motion is groundless because the NOV explicitly notified the company of the project at issue, satisfying the requirements of the law. Moreover, the company's own statements make clear it understood the scope of the NOV and had actual notice.

[1] As discussed below, the relevant rules cannot be evaded simply by calling each aspect of an outage a separate project.

A. The NOV Explicitly Includes the Entire Spring 2010 Outage

DTE's argument relies on the notion that EPA's NOV was not broad enough to encompass the entire 2010 "makeover" outage, and was instead limited to just three boiler component replacement projects undertaken as part of the overhaul. *See, e.g,.* Def. Brief at 12-14. The NOV itself disproves Defendants' claim.

First, the NOV cites to Defendants' "Planned Outage Notification" letter ("Notice Letter") and states that the Notice Letter "describes the activities that would take place during the outage." Def. Br. Ex. 1 at ¶ 19. The Notice Letter is thus incorporated into the notification provided by EPA. *See United States v. Brotech Corp.*, No. Civ. A. 00-242 8, 2000 WL 1368023, at *2 (E.D. Pa. Sept. 19, 2000) (finding notice requirement satisfied by letter accompanying formal NOV and that "substance…is more important than form."). The Notice Letter incorporated by the NOV listed four categories of "major" projects and specified a number of replacements in the addition to the boiler component upgrades. Doc. No. 8, Ex. 2-C at 1, Attachment A. In addition to the boiler component replacements, the Notice Letter specifically enumerates the following work:

- Replacement of 210 valves
- Rewind MTG rotor
- Install static exciter
- Replacement of generator lead box
- Overhaul of north boiler feed pump turbine and rebuild south boiler feed pump
- Install boiler feed pump TSI
- Replace system transformers
- Rebuild 9-4160V circuit breakers
- Replace 10 air heater gas side expansion joint

Id. It was thus Defendants themselves that identified the work in the Spring 2010 outage, and EPA specifically informed DTE that the NOV encompassed all of that "outage" work as

described by DTE. DTE cannot be heard to now complain that it lacked notice of the full extent of the very work that it itself identified, and that EPA incorporated into the NOV.

Moreover, after citing to the Notice Letter and incorporating its description of all the "activities" occurring during the outage, the NOV continues:

> 20. The construction activities that DTE commenced on or about March 13, 2010, *include, but are not limited to* the following work on the unit's boiler: replacement of economizer tubes, replacement of reheat pendants; and replacement of a section of waterwall tubes and burner cells.
>
> ***
>
> 22. The *physical change identified in the Paragraph 20*, above, resulted in a significant net emissions increase...

Def. Br. Ex. 1 at ¶¶ 20, 22 (emphasis added). The NOV thus addresses the construction activities DTE began on March 13, 2010, which includes the entire scope of work for the outage. The fact that EPA went on to also flag some of the largest and most extensive components of the makeover does nothing to diminish the notice EPA had already provided with respect to the entire outage. Indeed, DTE's argument simply ignores the phrase "include, but are not limited to" in the paragraph identifying the most significant work.

EPA's notice was sufficient on its face under the established case law. EPA identified the regulation at issue and the plant and unit that violated the rule, consistent with prior decisions upholding the sufficiency of notices. *See, e.g., Navistar Intern. Transp. Corp. v. U.S. EPA*, 858 F.2d 282, 284-85 (6th Cir. 1988) (under a more specific Clean Air Act notice requirement,[2] notifying the source of each "painting booth" – analogous to a unit at a power plant – that violated a particular requirement satisfied the statute); *United States v. LTV Steel Co., Inc.*, 116

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[2] *Navistar* was interpreting 42 U.S.C. § 7420(b)(3), which requires a "brief but reasonably specific notice of noncompliance." The provision at issue here requires only that 30 days elapse from notice of the violation. 42 U.S.C. § 7413(a)(1). Nothing in the statute or case law prescribe the required form or content of such a notice. *See, e.g., United States v. BP Exploration & Oil Co.*, 167 F. Supp. 2d 1045, 1051 (N.D. Ind. 2001).

F. Supp. 2d 624, 632 (W.D. Pa. 2000) (upholding sufficiency of notice that identified (1) plant in violation; (2) regulation violated; and (3) the specific emissions sources (*i.e.*, units at a power plant) at the facility).

B. DTE Understood the Entire Project Was at Issue

The Parties' correspondence in the week before EPA issued the NOV makes clear that DTE viewed the outage work as a single project, and that both sides understood that the entire project was at issue.[3] DTE thus had actual notice of the violations, which satisfies the statutory requirement. *United States v. B & W Inv. Props*, 38 F.3d 362, 367 (7th Cir. 1994); *United States v. Chevron U.S.A., Inc.*, 380 F. Supp. 2d 1104, 1109 (N.D. Cal. 2005); *BP Exploration & Oil Co.*, 167 F. Supp. at 1051.

First, the week before the NOV was issued, EPA wrote to DTE counsel stating that EPA had "learned of information suggesting that DTE Energy ('DTE') is currently performing *a number of capital improvement projects* at unit 2 of the Monroe Power Plant. We have evidence indicating that these projects constitute modification(s) under the New Source Review ('NSR') provisions of the Clean Air Act." Doc. No. 8, Ex. 2-I, P. Brooks May 28, 2010 Letter to M. Solo at 1 (emphasis added).[4]

In response, DTE described the entire scope of work being performed as a single project: "As set forth in DTE's March 12, 2010 planned outage notification letter to the [state] permitting authority . . . *this project* does not require a permit." Ex. 1, M. Solo June 1, 2010 Letter to S.

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[3] Had DTE any doubt about the scope of the allegations, as it now claims in litigation, Def. Br. at 13, it only needed to ask EPA during one of the many conversations or exchanges of correspondence that occurred before the complaint was filed.

[4] Mr. Brooks' letter included as attachments both the Notice Letter and an article in the local newspaper entitled "Extreme Makeover: Power plant edition" about the project. Both attachments described multiple replacements taking place during the outage. For instance, the "Extreme Makeover" article described the replacement of a nine-ton exciter, a device necessary to create electricity in the generator, among other aspects of the work. Doc. No. 8, Ex. 2-I.

Argentieri ("DTE June 1, 2010 Letter") (emphasis added) at 2. As cited above, the March 12, 2010 Notice Letter listed about a dozen aspects of the outage work, and the DTE June 1, 2010 letter makes clear that the company viewed them all as part of a single project.

Finally, DTE's statements after the NOV was issued confirm that the company understood that EPA had alleged that the project as a whole was at issue. In its first substantive pleading in this litigation, DTE referred to the NOV as "asserting that the *outage work at Monroe 2* constituted 'major modifications under the [CAA]." Doc. No. 15 at 7. Similarly, shortly after receiving the NOV, DTE recognized that "EPA 'has determined' that Detroit Edison's Monroe Unit 2 projects constituted a 'major modification' under the Clean Air Act's and the Michigan SIP's Prevention of Significant Deterioration ('PSD') program." Ex. 2, M. Solo June 15, 2010 Letter to M. Palermo. This actual notice suffices to meet the statutory notice requirement. *See, e.g., B & W Inv. Properties*, 38 F.3d at 367.

C. The Notice Requirement Is Not a Bar To Enforcement

The very notice case law that DTE cites only confirms that EPA's NOV was sufficient. Courts have made clear that the requirement is not a technical minefield to prevent enforcement. There are two hallmarks of the Clean Air Act notice case law:

- First, courts have viewed sufficiency of NOVs "liberally," particularly when the United States is seeking to enforce the Clean Air Act. *BP Exploration & Oil Co.*, 167 F. Supp. 2d 1045 at 1051 (courts "generally view the sufficiency of an NOV liberally."); *LTV Steel*, 116 F. Supp. 2d at 632 (same; citing *Navistar*, 858 F.2d at 285-86); *United States v. AM General Corp.*, 808 F. Supp. 1353, 1362 (N.D. Ind. 1992) (same); *United States v. Ford Motor Co.*, 736 F. Supp. 1539, 1550 (W.D. Mo. 1990) ("In general, the Court would be inclined to view the sufficiency of a NOV liberally.").

- Second, courts have made clear that the requirement should not be used to prevent or delay enforcement. *Chevron*, 380 F. Supp. 2d at 1110 (NOV requirement not intended to make enforcement more difficult) (citing PL 101-549, Senate Rep. No. 101-228, pp 361-62); *United States v. Louisiana-Pacific Corp.*, 682 F. Supp. 1141, 1156 (D. Colo. 1988) (In requiring the issuance of an NOV, Congress "did not intend to create a jurisdictional technicality that could be abused to prevent even the most reckless and chronic polluter from being brought to trial.").

D. DTE's Argument Cannot Withstand Scrutiny

In the face of the expansive language of the NOV, its own admissions, and the case law dictating a broad interpretation of EPA's notice, DTE now argues, without citation, that EPA must explicitly name every aspect of the work for the notice to count. This claim contradicts the case law on the notice requirement and ignores the way both the courts and EPA treat NSR cases.

The case law demonstrates that the hyper-specificity sought by DTE is not required. The *LTV Steel* court specifically found that an NOV was sufficient when it identified "the plant in violation; the regulation being violated; and the specific emissions sources at the plant in violation." 116 F. Supp. 2d at 633. EPA meets that standard by issuing a notice that construction during the Spring 2010 outage at Monroe 2 violated specified aspects of the applicable regulations. *LTV Steel* is buttressed by the rest of the NOV case law, cited above, which shows that the notice requirement was not intended as a barrier to enforcement and notices themselves are broadly construed. By contrast, DTE advocates a restrictive reading, one that would make it impossible for EPA to satisfy the rule in a situation like this one, where an overall project might involve hundreds of individual elements.

Notably, DTE cites no case, and Plaintiff is aware of none, in which a court found notice was too limited to include all work done during an outage. The only case DTE cites concerning the required specificity of a notice of violation is *United States v. E. Ky. Power Coop.*, No. 5:04-cv-00034 (E.D. Ky. June 17, 2005).[5] *East Kentucky* is simply not on point, however, and in no way help's DTE's argument. In that case, unlike the present situation which involves coordinated work conducted during a single outage, the magistrate judge was asked whether plaintiff could take discovery on work performed in different outages that occurred "both *before* and *after*" the projects at issue. Def. Br. Ex. 7 at 2 (emphasis in original). Defendants there did not even challenge whether EPA could address work that was part of the noticed project, and the court had no cause to consider how broadly to interpret a notice. Rather, the issue in East Kentucky was whether to prohibit discovery on work performed at a different generating unit (Spurlock Unit 1) than the one named in the complaint (Spurlock Unit 2), and on work performed at a different outage at Spurlock Unit 2 that occurred five years after the 1992 outage identified in the complaint. *Id.* Moreover, here EPA notified DTE of exactly when and where the violation took place, unlike the language the company cites from the *East Kentucky* decision. *See* Def. Br. at 14. DTE's only quarrel is that when EPA identified and discussed the 2010 extreme makeover outage, it did not also list every single piece of equipment replaced during the outage – an impossible task given the massive scope of the renovation, which is not required by the statute or caselaw.

The infirmity of DTE's position is only confirmed by the extreme result that DTE concedes necessarily flows from its argument. According to DTE, a "collection of work"

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[5] To the extent DTE cites Clean Air Act citizen suit cases in reply, it is important to keep in mind that the citizen suit notice requirement is more stringent than that for the United States. *Compare* 42 U.S.C. § 7604(b) (citizen suit notice provision) and 40 C.F.R. § 54.3(b) (citizen suit notice regulations) *with* 42 U.S.C. § 7413(a)(1).

performed during a single outage can *never* be treated as a single project. *See* Def. Br. at 14-15. This contradicts NSR case law, practice, and common sense. As EPA stated in 1989, sources "cannot evade PSD and NSPS applicability by carving out, and seeking separate treatment of, significant portions of an otherwise integrated renovation program. *Such piecemeal actions, if allowed to go unchallenged, could readily eviscerate the clear intent of the Clean Air Act's new source provisions.*" Ex. 3, D. Clay February 15, 1989 Letter to J. Boston at 7-8 (emphasis added); *see also ASARCO Inc. v. Environmental Protection Agency,* 578 F.2d 319, 328 n.31 (9th Cir. 1978) (noting specter that failure to aggregate work could create "a troublesome loophole" in Clean Air Act New Source Performance Standards program). Similarly, in a 1987 determination that rejected the routine maintenance defense as applied to a comprehensive "rehabilitation" effort, EPA stated that although some of the needed work was "minor" or "moderate" when viewed individually, when "viewed as a whole, the minimum necessary rehabilitation work is extensive, involving key pieces of equipment.. . . and substantial time and cost." Ex. 4, D. Howekamp November 6, 1987 Letter to R. Connery at 6. So too here.[6] DTE's coordinated efforts, which occurred during a single outage, are properly treated as a single renovation for NSR modification purposes.

[6] The Casa Grande Determination involved renovation work that was predicted to cost about $900,000 over a three-four month outage at a copper processing plant. Ex. 4 at 5.

Consistent with EPA's guidance, courts in other enforcement cases have had little trouble treating individual activities as part of a larger whole when faced with coordinated rehabilitation efforts.[7] For instance, in *United States v. Murphy Oil USA, Inc.*, the court explicitly aggregated work done over three years "[i]n light of the evidence that the two projects were planned and implemented almost simultaneously and modified the same process unit . . . ." 155 F. Supp. 2d 1117, 1141 (W.D. Wis. 2001). In other cases, courts have considered multiple activities done during an outage as a single project. *Wis. Elec. Power Co. v. Reilly,* 893 F.2d 901, 907-909 (7th Cir. 1990) ("*WEPCo*"); *United States v. Cinergy Corp.*, 495 F. Supp. 2d 909 (S.D. Ind. 2007); *United States v. Ohio Edison Co.*, 276 F. Supp. 2d 829, 856-57 (S.D. Ohio 2003).[8]

II. The Court Need Not Enter A Protective Order

The appropriate cure for any NOV found to be insufficient to cover the entire project is not the imposition of a protective order but simply the service of a revised notice followed by an amended complaint. The cases upon which DTE itself relies confirm that EPA may simply issue a new NOV and amend its complaint after 30 days pass. *See, e.g., Hallstrom v. Tillamook County*, 493 U.S. 20, 32 (1989) (cited in Def. Br. at 8) (plaintiffs who failed to comply with the

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[7] The only case DTE cites on aggregation is *Nat'l Parks Conservation Ass'n v. Tenn. Valley Auth.*, No. 3:01-CV-071, 2010 WL 1291335 (E.D. Tenn. Mar. 31, 2010) ("*NPCA*"). However, *NPCA* does not explain the basis for treating the two projects at issue in that case separately, rendering it of little persuasive value. Plaintiff in that case did not even seek to have the projects considered together.

DTE also quotes extensively from EPA's description of an aggregation rule that was almost immediately stayed and that the agency has proposed to revoke. *See* Def. Br. at 17; 75 Fed. Reg. 19,567, 19,568, 19,573 (Apr. 15, 2010). EPA's description of an inapplicable rule amendment is not relevant.

[8] DTE attempts to distinguish *WEPCo* and *Cinergy* because they involved "massive 'life extension'" projects. Def. Br. at 15. Such a comparison does not help DTE's argument, however, in light of the massive scope of the $65 million overhaul and extreme makeover of Monroe Unit 2. In any case, DTE provides no persuasive logic for treating big life extension projects as a single effort, but not other work that is coordinated and conducted together.

statutory notice requirement "remain free to give notice and file their suit in compliance with the statute to enforce pertinent environmental standards").[9] Granting a protective order that precluded certain discovery for that brief period would only serve to delay these proceedings, and the Court has ample discretion to avoid such an inefficient exercise. *See, e.g., Lavado v. Keohane*, 992 F.2d 601, 604 (6th Cir. 1993) ("the scope of discovery is within the sound discretion of the trial court."). As the Supreme Court has instructed, because "discovery itself is designed to help define and clarify the issues," the limits set forth in Rule 26 must be "construed broadly to encompass any matter that bears on, or that reasonably could lead to other matters that could bear on, any issue that is or may be in the case." *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 351 (1978); *see also Conti v. Am. Axle & Mfg., Inc.*, 326 Fed. Appx. 900, 904 (6th Cir. 2009) (quoting *Oppenheimer*, 437 U.S. at 351).

Given that the material would be – in the worst case – indisputably discoverable after EPA issues a revised NOV, DTE cannot show the good cause necessary to obtain a protective order. *Nix v. Sword*, 11 Fed. Appx. 498, 500 (6th Cir. 2001). DTE notes that a good cause standard applies, but utterly fails to "articulate specific facts showing clearly defined and serious injury resulting from the discovery sought." *Id.* (internal quotation marks omitted). Without such a showing, DTE is not entitled to a protective order. *Id.* As one of the cases DTE cites explained, "In light of the fact that one NOV is sufficient to put a source on notice, I fail to see what possible purpose could be served by forcing the EPA to continually issue identical NOVs to the same offender." *Louisiana-Pacific*, 682 F. Supp. at 1156. Such an unnecessary delay is precisely what DTE seeks here by asking for allegedly more specific notice of what it has

[9] This case was interpreting the citizen suit notice provision under the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. § 6972. The same principle applies to the Clean Air Act notice requirement.

already has conceded it contemporaneously understood – that the violation at issue in this case includes the renovation work performed during the Spring 2010 outage.

III. Both EPA And DTE Viewed The Work As One Project Until After The Preliminary Injunction Hearing

DTE attempts to bolster its argument by asserting that the United States only looked at the entirety of the project after the preliminary injunction hearing. Def. Br. at 7. However, the record demonstrates that it is DTE that has "Change[d] Its Tune," perhaps to respond to the infirmity of its routine maintenance argument that was highlighted during the hearing.

Plaintiff has consistently addressed the entire project in litigation this case. Indeed, we have repeatedly referred to the "$65 million overhaul" that DTE performed – using the total cost of the outage. The complaint refers to a "major overhaul project" costing $65 million. Doc. No. 1 at ¶46. The preliminary injunction motion filed the next day repeatedly referenced a single, $65 million project. *See, e.g.*, Doc. No. 8 at 10, 13, 18, 20. Plaintiff also referred to the 700 workers involved in the project, another statistic that addressed the work as a whole. *Id.* at 11. Contrary to DTE's claim, Def. Br. at 6, the United States' experts also addressed the entire project. For instance, Michael Hekking specifically referenced several aspects of the work done in addition to the boiler component upgrades, such as the replacement of the exciter and the generation lead box. Doc. No. 8, Ex. 6, Declaration of Alan Michael Hekking at 38.[10]

Despite the United States' repeated references to the project as a whole, DTE never complained about the scope of Plaintiff's case until *after* the preliminary injunction hearing. In

[10] Interestingly, DTE itself described the project as "consist[ing] primarily of tube component replacements." Ex. 1, DTE June 1, 2010 Letter at 2; *see also* Doc. No. 46, Ex. 3, Declaration of DTE Vice President Skiles Boyd at ¶17 ("work . . . involved primarily economizer, reheater and waterwall replacements"). To the extent Plaintiff's proof focused on the boiler component upgrades, it was perfectly consistent with the company's assessment of the primary elements of the work.

fact, during the hearing, DTE indicated that it understood the scope of the United States' allegations:

> If one looks at the other stuff that comes under the outages it was with pumps and valves, and gaskets and other things that are normally replaced. So when we saw the Government's preliminary injunction motion we figured they would focus on what the big capital projects are. But *this whole project together* is something that's routine maintenance and replacement.

Ex. 5, Excerpts of Preliminary Injunction Hearing Transcript at 61:22-62:3 (emphasis added). When DTE later addressed whether the project was routine maintenance, the company made comparisons based on the entire $65 million cost. *Id.* at 83:13-20. In a demonstrative presented to the Court, DTE referred to the $65 million overhaul as the "Projects at Issue." Ex. 6, Defendants' Hearing Demonstrative, "Cost of Monroe Unit 2 Work."

Only DTE knows why it changed positions on the scope of the project between the preliminary injunction hearing and the filing of its motion for a protective order. DTE's new argument that only half the project is covered by the NOV may be a reaction to a point made by the United States at the preliminary injunction hearing, that DTE had no evidence that the $65 million project was routine when considered as a whole, as required by EPA's guidance. Ex. 5 at 25:19-24. Defendants may have decided it was easier to attempt to use the notice requirement to try to pare back Plaintiff's claim than to prove that a $65 million overhaul is routine in any sense of the word. Twelve days after the preliminary injunction hearing, DTE first objected to Plaintiff referring to the outage work as a single project and first raised the claim that the NOV was insufficient. Ex. 7, M. Bierbower January 31, 2011 Letter to T. Benson. Whatever the reason for DTE's change of position, one thing is clear: The NOV sufficiently put DTE on notice that the alleged violation at issue in this case is the $65 million makeover performed during the Spring 2010 outage.

CONCLUSION

Defendants seek to turn the notice requirement into a procedural minefield – exactly what Congress and the courts have said it was not meant to be. DTE received adequate notice that the entire Spring 2010 project was at issue in this litigation. DTE's own statements show that it understood the whole project was at issue. Plaintiff respectfully requests that the Court deny the motion and order an expedited response to Plaintiff's long-pending discovery requests, so that the Parties may concentrate on the merits of the case.

Respectfully Submitted,

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Assistant Attorney General
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Dated: April 6, 2011

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CERTIFICATE OF SERVICE

I hereby certify that on April 6, 2011, the foregoing brief in opposition was filed electronically using the Court's ECF system and served on counsel of record via ECF.

s/ Thomas A. Benson

Counsel for the United States

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN

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APPENDIX A

List of Exhibits

Exhibit No.	Description
1	June 1, 2010 Letter from Michael Solo (DTE Energy) to Sabrina Argentieri (U.S. EPA)
2	June 15, 2010 Letter from Michael Solo (DTE Energy) to Mark Palermo (U.S. EPA)
3	February 15, 1989 Letter from Don Clay (U.S. EPA) to John Boston (Wis. Elec. Power Co.)
4	November 6, 1987 Letter from David Howekamp (U.S. EPA) to Robert Connery (Counsel for Casa Grande Corp.)

Exhibit No.	Description
5	Excerpts from January 19, 2011 Hearing on Plaintiff's Motion for Preliminary Injunction
6	DTE Energy Co.'s Demonstrative Exhibit from January 19, 2011 Hearing entitled "Cost of Monroe Unit 2 Work"
7	January 31, 2011 Letter from Mark Bierbower (Counsel for DTE Energy Co.) to Thomas Benson (U.S. DOJ)

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Exhibit 1

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One Energy Plaza, Detroit, MI 48226-1279

DTE Energy

MICHAEL J. SOLO, JR.
Attorney
(313) 235-9512

June 1, 2010

Sabrina Argentieri
Associate Regional Counsel
U.S. Environmental Protection Agency—Region 5
77 West Jackson Boulevard
Chicago, Illinois 60604

Re: Request to Provide Information Pursuant to the Clean Air Act
Dated May 28, 2010

To Whom It May Concern:

Enclosed with this letter please find The Detroit Edison Company's ("Detroit Edison") response to the United States Environmental Protection Agency's ("EPA") Request to Provide Information Pursuant to the Clean Air Act ("Information Request"), dated May 28, 2010. The Information Request sent late on Friday afternoon prior to the Memorial Day Holiday weekend afforded Detroit Edison approximately one business day to provide its response. Due to this unreasonably short period of time for Detroit Edison to provide the requested information, and due to significant logistical issues in determining all of the potential additional information available to respond to the Information Request, Detroit Edison's reserves the right to amend or supplement this response.

Detroit Edison objects to the extent the Information Request is: (1) not related to whether Detroit Edison has been in compliance with applicable provisions of the federal Clean Air Act; (2) seeks information that is confidential and/or privileged; and/or (3) beyond the scope of EPA's legal authority. Further, by providing this response, Detroit Edison does not admit or acknowledge any noncompliance whatsoever with regard to the Clean Air Act, the Michigan State Implementation Plan or any other matter.

In the May 28, 2010 Information Request, EPA requested that Detroit Edison provide the date that it currently expects to complete the Monroe Power Plant's Unit 2 Outage. Detroit Edison expects that the current outage will be concluded on June, 9 2010. Detroit Edison also anticipates limited operation and testing of the unit prior to the conclusion of the outage.

EPA further requested information that Detroit Edison believes supports the contention that the work being performed does not require a permit. As set forth in DTE's March 12, 2010 planned outage notification letter to the permitting authority, the Michigan Department of Natural Resources and the Environment ("MDNRE"), this project does not require a permit because it is (1) routine maintenance, repair and replacement ("RMRR") under EPA's historic and Michigan's implementation of that term; and (2) the project would not result in a significant emissions increase.

With respect to RMRR, the project consists primarily of tube component replacements, similar to hundreds of such replacements in the industry and within DTE's system. As a matter of fact, Michigan Air Pollution Rule 285 (a) specifically exempts the tube and generator repair as examples of RMRR.

With respect to emissions increase, as discussed more fully below, Detroit Edison has thoroughly evaluated the project, as it has done for virtually every large outage over the last decade. Detroit Edison has carefully complied with the direction provided by the EPA on May 23, 2000 in response to the company's requested applicability determination on a project at the same plant at that time. We have consistently reported maintenance, repair and replacement projects to the MDNRE with baseline emissions and projected emissions, excluding "emission increases that are caused by other factors, for example, emission increases ... due to variability in control technology performance or coal characteristics," and, "that portion of its emissions attributable to increased use at the unit due to the growth in electrical demand for the utility system as a whole since the baseline period." MDNRE is intimately familiar with Detroit Edison's methodology for making these analyses, and it has never questioned any of Detroit Edison's submittals, including the one at issue here for the Monroe Unit 2 project. The applicable regulations call for a comparison of "projected actual emissions" and "baseline emissions" to determine whether a project would result in a significant emissions increase. To account for the statutory requirement of causation, the regulations require the Company to

> Exclude, in calculating any increase in emissions that results from the particular project, that portion of the unit's emissions following the project that an existing unit could have accommodated during the consecutive 24-month period used to establish the baseline actual emissions and that are also unrelated to the particular project, including any increased utilization due to product demand growth.

MAR 1801(ll)(ii)(C). In addition, the regulations require the Company to

> Consider all relevant information, including but not limited to, historical operational data, the company's own representations, the company's expected business activity and the company's highest projections of business activity, the company's filings with the state or federal regulatory authorities, and compliance plans under the state implementation plan.

MAR 1801(ll)(ii)(A).

One fact that was clear to the MDNRE but that EPA may not have been aware of is that Monroe Units 1 and 2 share a stack. As a result, in the past, emissions from the two units have been prorated based on electrical generation. Beginning in 2013, we are projecting emissions separately, as Unit 1 will exhaust to a separate stack because it will be outfitted with a flue gas desulfurization (FGD) system and a new stack. As a result, the baseline year is actually based on the average emission rate between a unit controlled with SCR and one that is not controlled.

Detroit Edison recognizes that the regulations require essentially two steps in determining the "projected actual emissions" for the unit. First, the Company must project emissions for five years after the project, based on the Company's general methodologies for estimating future utilization and emissions, and accounting for all relevant information as of the date of the projection. Second, the Company must exclude increased emissions that (1) are unrelated to the project and (2) could have been accommodated in the baseline period.

Accordingly, in evaluating this project, Detroit Edison first used its then current system-wide projection, which it had already filed with the Michigan Public Service Commission. That projection used PROMOD, a production cost model widely used in the industry for short to medium range projections. The model used to make these projections did *not* include any changes to the characteristics of the unit based on the project, because the project is not expected to affect the performance characteristics of the unit as compared to its characteristics before the project. Thus, while the model projected increases in the unit's utilization and emissions as compared to the baseline, those increases are completely unrelated to the project. They are due to (then) expected increased demand on the unit as a result of myriad factors, including most notably an increase in demand for the system as a whole and an extended outage for Monroe Unit 1 in 2013 for the purpose of tying new environmental controls for that unit (a scrubber).

It should be noted that at the time of the March notification, a primary driver for a projected increase in generation (and commensurate projected

increase in emissions) from the Monroe Power Plant was an expected increase in power demand accompanied by an increase in energy cost by $5.85/MWh. This increase in power demand, and increased costs of power, led to an increase in power demanded from Monroe Unit 2. This increase in power demand led to the following other factors affecting emissions:

- Monroe 2 has no periodic outage scheduled for 2013, while it had outages planned in 2010, 2012 and 2014, three of the other years that were evaluated as part of the letter. Significant work (tie-in of a new FGD) is planned for Monroe Unit 1 and Monroe Unit 2 must help make up the difference in electricity demand. The plant does not generally schedule outages on more than one unit per year and will not overlap outages.
- An increase in demand from all the units in Detroit Edison's portfolio. For example, Monroe units were expected to increase generation from a projected 15,398 MW-hrs in 2010 to 19,172 MW-hrs in 2014, as reported in the PSCR report last fall. The entire fossil generation portfolio was expected to increase generation from a projected 44,595 MW-hrs in 2010 to 48,617 MW-hrs in 2014.
- Monroe can accommodate and has historically accommodated a wide range in fuel blends and this fuel variability is allowed under our permit as well as referenced in our Monroe Applicability Determination. Beginning in 2013, all the Monroe units will be blending significantly less low sulfur western coal, about a 3% drop in weight from 2012.

Notably, the scenario reflected in the PROMOD projections reported in the March notification is not the case any longer, as the cost of natural gas has dropped significantly. But this information was not available when the PSCR forecast was submitted last fall. If current information were used, it is unlikely that we would have even projected increased demand (and emissions) for this unit.

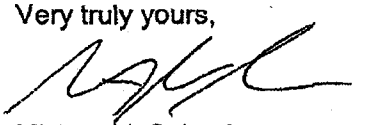
As noted earlier, an increase in utilization due to "demand growth" can be excluded from emissions increase estimates, as it was in Detroit Edison's analysis. Just as a note of interest, although the projections made in our March 12, 2010 notification were based on the latest official PROMOD run, it is now believed that emission projections will be less due to the continuing lower price of natural gas and the slower economic recovery of the area.

Detroit Edison also determined that the projected increases could have been accommodated in the baseline period. Specifically, the projected capacity factor for 2013 for Monroe Unit 2 is 82.5%. During the baseline period of May, 2005 through April, 2007, the equivalent availability factor of the unit was approximately 85.2%, and thus the unit could have accommodated the projected increase. As a result, Monroe Unit 2 could have generated the 5,478,000 MW-hrs

described in our letter, had the market required the electricity during our baseline period.

I trust that you will find this response to the Information Request satisfactory. If you have any questions regarding this submission, please contact the undersigned.

Very truly yours,



Michael J. Solo, Jr.

MJS/dmc
Enclosure
cc: William Presson , MDNRE
Mark Palermo, EPA Region 5
Ethan Chatfield, EPA Region 5
Skiles Boyd, Detroit Edison
William Brunell, Detroit Edison Counsel

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN

UNITED STATES OF AMERICA,

Plaintiff,

And

NATURAL RESOURCES DEFENSE COUNCIL, INC. AND SIERRA CLUB,

Intervenor-Plaintiffs,

v.

DTE ENERGY COMPANY AND DETROIT EDISON COMPANY,

Defendants.

Civil Action No.
2:10-cv-13101-BAF-RSW

Judge Bernard A. Friedman

Magistrate Judge R. Steven Whalen

PLAINTIFF'S OPPOSITION TO DEFENDANTS' MOTION FOR PROTECTIVE ORDER

Exhibit 2

DTE Energy Company
One Energy Plaza, Detroit, MI 48226-1279

DTE Energy

MICHAEL J. SOLO, JR.
Attorney
(313) 235-9512

June 15, 2010

Mark Palermo
Associate Regional Counsel
U.S. Environmental Protection Agency—Region 5
77 West Jackson Boulevard
Chicago, Illinois 60604

Re: Request to Provide Information Pursuant to the Clean Air Act
Dated June 4, 2010

Mr. Palermo:

Enclosed with this letter please find The Detroit Edison Company's ("Detroit Edison") response to the United States Environmental Protection Agency's ("EPA") Request to Provide Information Pursuant to the Clean Air Act ("Information Request"), dated June 4, 2010. This third Information Request related to recent projects at Monroe Unit 2 comes on the heels of two previous requests received over the Memorial Day Holiday and the last two weeks. Due to the limited period of time for Detroit Edison to provide the requested information, and due to significant logistical issues in determining all of the potential additional information available to respond to the Information Request, Detroit Edison reserves the right to amend or supplement this response.

The Information Request states at the outset that EPA "has determined" that Detroit Edison's Monroe Unit 2 projects constituted a "major modification" under the Clean Air Act's and the Michigan SIP's Prevention of Significant Deterioration ("PSD") program. As an initial matter, Detroit Edison strongly objects to this statement and believes that EPA's conclusion is incorrect. As DTE has explained previously, the projects at issue are comprised primarily of tube component replacements, similar to hundreds of such replacements in the industry and within Detroit Edison's system. These projects are also very similar to tube component replacement projects that the Court in *National Parks Conservation Ass'n v. Tenn. Valley Auth.*, 2010 WL 1291335 (E.D. Tenn. Mar. 31, 2010), found to be routine maintenance, repair and replacement and thus excluded from PSD.

Putting aside whether these projects are "routine" within the meaning of the Michigan SIP and PSD regulations, in an abundance of caution, Detroit Edison analyzed the projects to determine whether they would result in a significant emissions increase and notified the Michigan Department of Natural Resources and the Environment ("MDNRE") about the projects well before the outage. Over the last two weeks, Detroit Edison has provided EPA with additional information explaining the Company's analysis. We have heard nothing from EPA about why it appears to disagree with our analysis. We continue to be perplexed by this action regarding an outage to maintain a unit, and which will not increase emissions.

In any event, as we have communicated to you and others at EPA and the Department of Justice, Detroit Edison remains committed to resolving this matter, as well as the previously-issued notice of violation for projects at several of Detroit Edison's plants, amicably and without litigation if possible.

Detroit Edison objects to the extent the Information Request is: (1) not related to whether Detroit Edison has been in compliance with applicable provisions of the Federal Clean Air Act; (2) seeks information that is confidential and/or privileged; and/or (3) beyond the scope of EPA's legal authority. Further, by providing this response, Detroit Edison does not admit or acknowledge any noncompliance whatsoever with regard to the Clean Air Act, the Michigan State Implementation Plan or any other matter.

In the June 4, 2010 Information Request, EPA requested that Detroit Edison provide all documents for the PROMOD run used in the Detroit Edison September 2009 PSCR filing, including but not limited to, (i) input and output data specifically identified as such, (ii) settings information; (iii) all information necessary to run the PROMOD simulation, (iv) information describing current conditions, (v) any explanatory materials related to the operation of the model (including instructions and user guides), and (vi) documents relating to the development or discussion of input values related to availability or outage rates used in the model run.

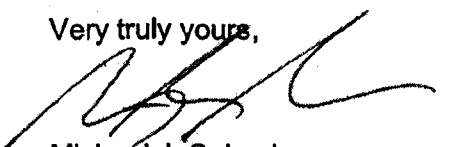
As indicated in prior communications between Detroit Edison and EPA concerning this request, PROMOD is comprised of a confidential and proprietary computer model and related software owned by Ventyx Inc.. We contacted Ventyx Inc. and inquired about provision of PROMOD materials covered by your Information Request. Ventyx Inc. has communicated to Detroit Edison that the disclosure of most of the requested information, including PROMOD input data files, could cause competitive harm to Ventyx Inc. and that EPA is not a PROMOD licensee, and hence proprietary materials may not be supplied to EPA by a PROMOD licensee. Accordingly, we are not providing those materials at this time.

In the event EPA intends that this information be submitted directly to an entity licensed to utilize and receive PROMOD data, please provide the name of such entity. Ventyx Inc. has indicated that it will verify the licensing and then provide Detroit Edison authorization to provide the data to the licensed entity. Detroit Edison is willing to and intends to cooperate fully with EPA to resolve this issue.

In further response to the Information Request, attached please find documents not considered proprietary information of Ventyx Inc. This includes documents relating to the development or discussion of input values related to availability or outage rates used in the model run. Regarding the request for any explanatory materials related to the operation of the model, please visit the Ventyx Inc. website (www.ventyx.com/analytics/promod.asp) that contains the requested information and material.

I trust that you will find this response to the Information Request satisfactory. Please contact me to address the PROMOD licensing issue or if you have any questions regarding this submission.

Very truly yours,



Michael J. Solo, Jr.

MJS/dmc
Enclosure
cc: William Presson , MDNRE
Ethan Chatfield, EPA Region 5
Skiles Boyd, Detroit Edison
William Brownell, Detroit Edison Counsel

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN

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Plaintiff,

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2:10-cv-13101-BAF-RSW

Judge Bernard A. Friedman

Magistrate Judge R. Steven Whalen

PLAINTIFF'S OPPOSITION TO DEFENDANTS' MOTION FOR PROTECTIVE ORDER

Exhibit 3

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

FEB 15 1989

Mr. John W. Boston
Vice President
Wisconsin Electric Power Company
Post Office Box 2046
Milwaukee, Wisconsin 52301

Dear Mr. Boston:

This is a revised final determination, on reconsideration, regarding the applicability of the Clean Air Act's New Source Performance Standards (NSPS) and Prevention of Significant Deterioration (PSD) provisions to the proposed life extension project at the Port Washington steam electric generating station, which is owned and operated by Wisconsin Electric Power Company (WEPCO). This determination supplements the determination set forth in an October 14, 1988 letter to you from Lee M. Thomas, which in turn incorporated my September 9, 1988 memorandum. I find it necessary to reconsider EPA's original determination and issue this revised determination in part to address matters raised by, and new information submitted by, WEPCO representatives since the October 10 letter. WEPCO believes that these new aspects call into question the accuracy of EPA's prior determination.

For the following reasons, EPA today reaffirms, with limited exceptions detailed below, its earlier findings regarding the Port Washington life extension project. I hereby incorporate by reference the October 14 letter and the September 9 memorandum, and reaffirm the findings and conclusions in those two documents except where they are specifically superseded below.

This action constitutes final agency action for purposes of judicial review under section 307(b) of the Clean Air Act, 42 U.S.C. Section 7607(b).

I. CAPITAL EXPENDITURE

EPA explained in its earlier determination that under the General Provision of the NSPS regulation, a physical or operational change which increases emissions at an affected facility is a modification subject to NSPS. See 40 CFR 60.14(a). However, 40 CFR 60.14(e) provides certain exceptions to that general rule. In particular, section 60.14(e) (2) provided that an increase in production rate at an affected facility would not, by itself, be considered a modification if that increase is accomplished without a capital expenditure.

As has been discussed in recent meetings between WEPCO and EPA, the October 14, 1988 letter from Lee M. Thomas was based in part on information

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supplied by WEPCO in a letter dated October 11, 1988 which indicated that the increase in production rate at each of the five units would be accomplished with a capital expenditure. On October 13, 1988, and November 22, 1988 WEPCO submitted revised capital expenditure calculations. EPA has carefully reconsidered its earlier determination based on those two additional submissions(see Footnote 1). However, as explained below, they provide no grounds on which to alter EPA's earlier finding on capital expenditure.

The modification provisions are designed in part to subject to NSPS those emissions increases caused by an increase in production rate that is in turn attributable to a significant investment in improvements to the capital stock. Consistent with this intent, capital expenditure calculations employ the total, as opposed to annual, cost of a given project at each affected facility.

Thus, the December 16, 1975 preamble to the promulgated definition of capital expenditure states that "the total cost of increasing the production or operating rate must be determined. All expenditures necessary to increasing the facility's operating rate must be included in this total" (40 FR 58416) (emphasis added). The total cost of the planned work at each facility is then compared to the product of the existing facility's basis and the annual asset guideline repair allowance percentage used by the Internal Revenue Service for taxation purposes. If the total project cost for each facility exceeds the product of the basis and repair percentage for each facility, there is a capital expenditure at that facility. See 40 CFR 60.2.

It is appropriate to accumulate, for capital expenditure purposes, the cost of the renovations necessary to increase the facility's production rate, because the overall work necessary to increase a facility's production rate pursuant to a particular renovation project is the same whether the work is performed in one calendar year or during two (or more) years. The use of annual costs could encourage sources to distort normal business planning by artificially stretching out costs over time as a means of evading a finding of capital expenditure and consequent NSPS coverage (see Footnote 2).

(Footnote 1) October 13, 1988 submission was not received in time to be considered in issuing EPA's letter of October 14, 1988.

(Footnote 2) Indeed, it appears that WEPCO may have extended the planned length of the Port Washington life extension project for precisely this purpose after being informed by EPA in the October 14, 1988 letter that there would be a capital expenditure using the original schedule. The unit 1 renovations have been extended from four years to five; unit 2 has been extended from four years to six; unit 3 had been extended from three years to six; unit 4 has been extended from two years to four. (Compare Telecopier Transmission, Neil Childress, WEPCO, to Gary McCutchen, EPA, October 11, 1988 (table attached to Response to Question No. 4) with Letter, Neil Childress, WEPCO, to Walt Stevenson, EPA, November 22, 1988, at page 2.)

Rather, the purpose of the exemption in 40 CFR 60.14(e) (2) is to exclude from NSPS coverage increases in production rate that are accomplished without "an expenditure for long-term additions or improvements." See 39 FR 36948 (preamble to proposed NSPS regulations). Where the economic realities of the case are that increased production and, hence, emissions, are due to normal fluctuations in the business cycle rather than a considered decision to invest in substantial capital improvements, the NSPS do not apply.

The letter submitted on October 13 from Neil Childress of your staff to Gary McCutchen of EPA presented updated basis figures (determined by multiplying the original capital investment in the facility by a coefficient representing the inflation in construction costs between the year of the investment and the year in which the capital expenditure calculation is made) for each of the emissions units at Port Washington. These figures included costs of repair or replacement of equipment, such as steam turbines, that is not part of the existing affected facility for NSPS purposes. Since applicability determinations under the NSPS modification provisions are based on the existing affected facility, capital expenditure determinations likewise are limited to costs associated with the affected facility. For NSPS Subpart Da, the affected facility is the steam generating unit as defined at 40 CFR 60.40a. Therefore, EPA staff requested WEPCO to limit the basis figures to the steam generating unit.

The November 22, 1988 letter from Neil Childress to Walt Stevenson of EPA presented revised cost figures on the renovation work on steam generating units 1 - 4 related to the capital expenditure calculations. These November 22 basis figures are understood to be limited to costs associated with the affected facility. The November 22 letter also presented a revised and extended schedule for the renovation work, under which the costs of repairs in any one year would not exceed the product of the annual asset guideline repair allowance percentage, which is 5% for electric utility steam generating units, and the basis of each unit. Mr Childress' letter concluded that since 5% of each

unit's updated basis is not exceeded by the cost of renovation work in any one year, there would not be a capital expenditure at any of the units. The revised figures also show that the total costs for each unit over the entire renovation period would exceed the 5% basis figure by 50% to 325%.

As explained above, it is the total cost, not the annual cost of a renovation project that determines whether a capital expenditure has occurred. Accordingly, based on the calculations and total project costs in WEPCO's November 22, 1988 letter, the proposed project would result in a capital expenditure at each of the five Port Washington units, and those units would not qualify for the exemption in the NSPS modification provisions at 40 CFR 60.14(e) (2) (see Footnote 3). As to unit 5, WEPCO did not submit cost data limited to the affected facility. Thus, I have no reason to alter EPA's original determination that WEPCO has not demonstrated that the increase in production rate at unit 5 can be accomplished without a capital expenditure.

In addition, I have determined that it is more appropriate to utilize the original basis of each affected facility (as adjusted to reflect past capital improvements), expressed in nominal dollars, rather than the updated basis, expressed in current dollars, in determining NSPS applicability. Thus, even if WEPCO were correct that annual renovation costs, rather than total costs, should be used in capital expenditure calculations, in this case a comparison of annual renovation costs and the

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(Footnote 3) WEPCO has argued that since the definition of capital expenditure at 40 CFR 60.2 refers to the IRS "annual asset guideline repair allowance percentage" (emphasis added), EPA is bound by the literal language of its own regulations to use annual rather than total project costs in making capital expenditure calculations. However, the regulations do not dictate such a result. Instead, on their face they call for a comparison between total renovation costs and the annual asset guideline. Had EPA intended the result suggested by WEPCO, it would have explicitly called for comparison of annual costs of the change for project, exceeding one year with the annual asset guideline. This it did not do. In addition, as indicated above, the purpose of the capital expenditure provision would not be served by annualizing project costs for capital expenditure purposes.

(adjusted) original basis of each affected facility shows that a capital expenditure would still occur (see Footnote 4).

In making a more detailed inquiry into the capital expenditure matter in response to WEPCO's request, I have found that neither the NSPS General Provisions nor the preamble thereto contain any discussion of the matter of original versus updated basis, and that EPA has rarely been called upon to address this issue. However, upon review of EPA's past practice in this area, I have found that in developing performance standards for particular industries, EPA has provided the regulated community a mechanism to calculate the original basis in making capital expenditure calculations. See, e.g., "Equipment Leaks of VOC in Petroleum Refining Industry -- Background Information for Promulgated Standards," EPA-450/3-81-015b, December 7, 1983 (see Footnote 5). This suggests that EPA intended the original basis to be utilized to determine whether a capital expenditure is going to be made.

Moreover, I believe that the use of original basis is consistent with the overall purpose of the NSPS modification regulations in general, and the capital expenditure provisions in particular. The effect of using original basis is that the greater the age of an affected facility, the more likely it is that a given investment resulting in increased production will be deemed a capital expenditure and trigger NSPS. This is consistent with Congress' intent in adopting new source performance standards. Older facilities are more likely to use outdated equipment which does not reduce pollution to the extent more current technology does. Congress included modified sources within the new source performance standards of section 111 to ensure the use of new technology on such sources. See CAA Sections 111(a)(2), 111(a)(4);

II. AIR HEATER RENOVATIONS AT UNIT 1

In January 1989, WEPCO asked EPA to determine whether replacement of the heat transfer surface elements on the unit 1 air heater would trigger PSD or NSPS applicability. However, in a letter dated February 3, 1989, WEPCO withdrew this request,

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(Footnote 4) It is worth noting in this regard that if EPA were to adhere to a literal reading of IRS guidelines as urged by WEPCO, it would have no choice but to use original basis as well as annualized costs in making capital expenditure calculations for Port Washington. Using this formula, WEPCO would exceed the repair allowance percentage at units 1 - 5 for mostyears, and NSPS would still apply.

(Footnote 5) This Background Information Document provides an alternative to the method prescribed in the General Provision when it is difficult to determine original costs. The formula uses replacement costs and an inflation index to "approximate the original cost basis of the affected facility."

asserting that it could not receive approval in the time necessary, while reserving the right torenew it at a later time as to unit 1 or any other unit at Port Washington. Because this issue may arise again, and because I believe it bears upon the project as a whole, I find it appropriate to address the matter of air heater element replacement. Based on the information submitted regarding this new plan, as well as the earlier information submitted regarding air heater replacement work, I conclude that if WEPCO were to proceed under its revised and now withdrawn plan, it would not alter EPA's earlier finding that PSD and NSPS would apply. In order to explain this finding, it is useful to first summarize the relevant facts.

Originally, WEPCO advised EPA that it planned to replace the air heaters at units 1 - 4 in their entirety. As WEPCO explained:

> Air heaters are subject to the erosive and corrosive effects of the flue gas passing through them and require regular maintenance of the heat transfer surfaces.

The plate-type air heaters on Units 1 - 4 do not lend themselves to replacement of the individual elements. Worn sections have been patched and blocked, where accessible, over the years. Now, however, overall corrosion and perforation has passed beyond the practical point of repair, and replacement of the air heaters is the economical way to maintain the air preheater system.

The air heaters on Port Washington Unit 5 and the other units on the Wisconsin Electric system [other than Port Washington units 1 - 4] are of the Ljungstrom basket design, which allows the heat transfer surfaces (baskets) to be replaced easily. ***

See, e.g., List of Port Washington Projects, p. 6 (Attachment to April 21, 1988 letter from John W. Boston, WEPCO, to Gary McCutchen, EPA).

On January 11, 1989, WEPCO informed the State of Wisconsin that it was considering replacing all the plate elements at unit 1. In a letter to the State of Wisconsin, WEPCO described this project as routine repair work, "necessary to halt the continuing decrease in the capability of Unit 1," and submitted a list of 40 generating units where significant portions of the air heater have been replaced. See Letter, with attachment, from Mark P. Steinberg, WEPCO, to Dale Ziege, Wisconsin Department of Natural Resources, January 11, 1989.

In a telephone conversation with EPA staff the next day, WEPCO indicated that it desired to perform the unit 1 plate replacement work during a current unit outage: that it intended to replace only half, not all, of the elements, at a cost of approximately $500,000; that it intended to later scrap this work and replace the entire air heater as described in the original scope of work, at a cost of $2,600,000; and that it was considering performing the same work at unit 4 also. See Record of Telephone Conversation between David Schulz, EPA, and Mark Steinberg, Neil Childress, and Walter Woelfle, WEPCO, January 12, 1989.

In a meeting on January 17, 1989, WEPCO related that if it eplaced half of the plate elements now, it probably would replace the remainder as part of the total renovation project at a later date and not replace the air heater in whole. WEPCO also related that complete replacement of the plate elements should increase unit 1's capability to the original design capacity. Finally, WEPCO stated in response to questions from EPA staff that none of the air heaters or plate elements at units 1 - 4 had ever been replaced in the past. See Memorandum, Meeting with WEPCO regarding the Port Washington Generating Station, from David Schulz, EPA, to Files, January 27, 1989.

In addition to the above information, I note that WEPCO's list of 40 units at which air heater element replacements have occurred include no units containing plate elements such as those on units 1 - 4 at Port Washington. Instead, all of the examples submitted are of the Ljungstrom basket type or the tubular type. I conclude that those examples are too dissimilar to the plate-type elements in use at units 1 - 4 to support WEPCO's contention that the work in question is routine (see Footnote 6).

Based on all of the foregoing, I find no reason to depart from EPA's earlier conclusion that PSD and NSPS would apply to the air heater work on unit 1. It appears that despite WEPCO's recent recharacterization of this work as a separate project, it in properly viewed as an integral part of the overall Port Washington life extension project. WEPCO cannot evade PSD and NSPS applicability by carving out, and seeking separate treatment of, significant portions of an otherwise integrated renovation program. Such piecemeal actions, if allowed to go unchallenged, could readily eviscerate the clear intent of the Clean Air Act's

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(Footnote 6) Further, even the list of air heater replacement work submitted by WEPCO did not establish this as routine repair work. Those 40 units comprise only a small fraction of total operating utility units, and even at the 40 units, air heater repair or replacement appears to have been a one-time occurrence, not routine repair.

new source provisions. Accordingly, if seen as part of WEPCO's previously proposed renovation project, the recent recharacterization of the unit 1 air heater work does nothing to alter the factors determinative of PSD and NSPS coverage.

III. CAPACITY TESTING FOR UNITS 1 - 4

A. Impact of Test Results on NSPS Applicability:

In Lee Thomas' October 14, 1988 letter, EPA stated that baseline emissions for NSPS purposes are determined by hourly maximum capacity just prior to the renovations. EPA relied on actual operating data to determine that current maximum capacity at units 1 - 4 has significantly deteriorated, such that the restoration of original design capacity through the life extension project would result in corresponding emissions increases. As to unit 5, EPA stated that current capacity at unit 5 is zero because it is physically inoperable. EPA rejected WEPCO's unsupported assertions that all five units could be operated at high capacities, but held open the possibility of further discussions on that point. Subsequently, in November and December of 1988, following discussions with EPA, WEPCO conducted capacity tests to determine current actual capacity.

Based on its review and analysis of the test data, EPA finds that the tests adequately demonstrate that units 2 and 3 can be operated at their original design capacity on a sustained basis. Accordingly, I hereby supersede EPA's earlier determination and find that NSPS would not apply to units 2 and 3 by virtue of the proposed renovations so long as the capacity of these units after completion of the work is no higher than demonstrated in the recent tests (694,000 and 690,000 pounds of steam per hour, respectively). As discussed in more detail below, this revised NSPS determination does not affect our determination that the PSD provisions would be applicable to the proposed work on these two units.

During the tests on units 1 and 4, WEPCO was able to operate these units at 497,000 and 586,000 pounds of steam per hour, respectively, representing 72% and 89% of these units' respective original design capacities. These tests are adequate to confirm EPA's original determination that units 1 and 4 are not capable of operating at their original design capacities, and that restoration of the lost capacity through the life extension will trigger NSPS coverage. EPA today also determines that these tests are not adequate to show that current actual capacity for purposes of establishing the NSPS baseline is as high as the levels achieved during the recent tests. Rather, I reaffirm that baseline for those units is determined by the lower capacities reflected in recent actual operating data as set forth in Lee Thomas' October 14 letter. EPA must reject the tests for purposes of establishing

actual NSPS baselines because during the testing discussed above, there were significant, measured exceedances of the applicable particulate mass emission limit, and several measured exceedances of the applicable opacity limit contained in the Wisconsin State Implementation Plan. One of the purposes of these tests was to determine the maximum actual capacity of the Port Washington units that can be achieved in a lawful manner. As a consequence of the measured exceedances, WEPCO's tests cannot be relied on to demonstrate that the company could lawfully sustain the levels achieved during the testing.

Regarding unit 5, I find that by declining to conduct or schedule capacity tests, WEPCO has effectively conceded that unit 5 is at present inoperable. Therefore, I reaffirm that its baseline for NSPS purposes is zero.

B. Impact of Test Results on PSD Applicability.

In its February 3, 1989 letter, WEPCO asserted that EPA's October 14, 1988 determination assumed that the emission rate of each unit would increase following the renovations. Thus, WEPCO claims, EPA did not address the question whether units that are not increasing their emission rates following renovation can be deemed to trigger PSD. WEPCO is incorrect on both counts.

EPA's prior determination explained that under the PSD program, unlike NSPS, baseline emissions are determined by representative actual emissions prior to the physical or operational change. Accordingly, the results of testing conducted by WEPCO, intended to determine current maximum hourly capacity, have no impact on the existence of a significant net emissions increase for PSD purposes. Hence, those test results provide no reason to alter EPA's prior determination regarding PSD applicability.

Actual emissions are the product of the emission rate (amount of pollution per unit of production or throughput, e.g., pounds of sulfur dioxide per ton of coal combusted), the production rate or capacity utilization (amount of production or throughput per hour, e.g., tons of coal combusted per hour), and the hours of operation (e.g., hours per year). In its prior determination, EPA explained that an increase in any one of these three factors, if attributable to a physical or operational change, can trigger an emissions increase for PSD purposes, and rejected WEPCO's contention that only increases in the emission rate were determinative. In so doing, EPA explicitly assumed that emissions increases at Port Washington would come not from an increase in emission rate, but rather from increases in production rate or hours of operation. See Memorandum from Don R. Clay, September 9, 1988 at 8.

WEPCO further implies in its February 3, 1989 letter that the demonstration that units 2 and 3 can operate now at maximum design capacity means that there will be no increase in production rate for PSD purposes following the renovations. This is not the case because PSD baseline emissions are determined by representative actual emission rate, production rate, and hours of operation prior to the physical change. Representative actual emissions are determined by examining the actual emissions during a representative two year period, (See 40 CFR 52.21(b)(21)(ii)) which in this case the Administrator determined to be 1983 and 1984 (See Lee Thomas' Oct. 14 letter, at 5). The hourly capacity demonstration for NSPS purposes is not relevant to the PSD analysis.

IV. NSPS OPERATIONAL LIMITATIONS

In my September 9, 1988 memorandum, I pointed out that an affected facility cannot avoid NSPS applicability by offsetting, through the use of fuel with a lower sulfur content, an increase in the emission rate that would otherwise occur due to a physical or operational change. As I explained at that time, 40 CFR 60.14(e) provides that use of an alternative fuel or raw material -- such as higher-sulfur coal -- which an existing facility was designed to accommodate before a physical or operational change does not constitute a modification for NSPS purposes. It follows that the facility cannot avoid NSPS by switching to lower-sulfur fuel to counteract a prospective increase in emission rate because, under the regulations, the facility would always have to option to switch back to a higher-sulfur fuel at a later date without triggering NSPS.

Subsequent to the issuance of EPA's October 14, 1988 letter, WEPCO inquired whether it might be able to utilize lower-sulfur coal to avoid NSPS at Port Washington, notwithstanding the regulatory provision explained above, by agreeing to federally enforceable permit conditions that would bar the company from switching back to higher sulfur coal in the future. Restrictions of this nature are acceptable for netting transactions under the Act's PSD provisions. However, the statute reflects a basic political decision that fossil fuel-fired sources not rely only on natural occurring less-polluting fuels to comply with the NSPS. Instead, Congress declared that compliance must depend in part upon the application of flue gas treatment or other pollution control technologies. Thus, section 111(a)(1)(A)(ii) defines "standard of performance" for fossil fuel-fired sources as requiring the achievement of a percentage reduction in the emissions from such category of sources from the emissions which would have resulted from the use of

fuels which are not subject to treatment prior to combustion. Congress further clarified this point in a later paragraph of section 111(a) by adding:

For the purpose of subparagraph (1) (A) (ii), any cleaning of the fuel or reduction in the pollution characteristics of the fuel after extraction and prior to combustion may be credited ... to a source which burns such fuel.

This core policy judgment is reflected as well in the legislative history of the 1977 Clean Air Act amendments. For example, the Conference Report states:

The Senate concurs in the House provision with minor amendments. The agreement requires (1) that the standards of performance for fossil fuel-fired boilers be substantially upgraded to require the use of the best technological system of continuous emission reduction and to preclude use of untreated low sulfur coal alone as a means of compliance; ... (3) that for fossil fuel-fired sources, the new source performance standards must be comprised of both a standard of performance for emissions and an enforceable requirement for a percentage reduction in pollution from untreated fuel.

H.R. Rep. No. 95-564, 95th Cong., 1st Sess. 130.

Because the will of Congress is so clear that lower-sulfur fuels alone will not suffice to comply with NSPS, it would be inconsistent with the legislative intent for EPA to allow sources to use lower-sulfur fuel to avoid coverage of NSPS in the first instance in the manner suggested by WEPCO. If EPA were to follow such a course, numerous modifications to existing facilities could escape coverage in a manner contrary to the statutory purpose.

V. THE TIMING OF THE LIFE EXTENSION PROJECT

In discussions with EPA, WEPCO has challenged, on grounds of timing, EPA's position on baseline emissions for NSPS purposes. In its prior determination, EPA explained that under the NSPS regulations, baseline emissions are determined by hourly maximum capacity just prior to the renovations. Thus, the baseline for unit 5 at Port Washington is zero because the unit has been shut down for several years due to safety concerns. In response,

WEPCO has presented the hypothetical question whether EPA would still have found a zero baseline if unit 5 had been shut down on a Friday due to some unexpected or catastrophic failure of a major component previously in good working order, and WEPCO had sought to replace that component on the following Monday. WEPCO asserts that in such circumstances, EPA should have established baseline emissions using the emissions rate just prior to the breakdown.

I find it unnecessary to engage in speculation by addressing the hypothetical situation presented by WEPCO, because it is far removed from the true circumstances surrounding the proposed Port Washington life extension project. In fact, unit 5 has been shut down for over four years, not a weekend, and that is the foundation of EPA's analysis and determination.

In conclusion, with limited exceptions, EPA today reaffirms the decisions reached in the October 14 determination. In addition, EPA has concluded that the work on each unit constitutes a capital expenditure and that the proposed air heater plate replacement work on unit 1 would trigger PSD and NSPS. As a result of the capacity test demonstration, however, I find that units 2 and 3 at Port Washington can be operated at their design capacity on a sustained basis. Therefore EPA's earlier determination with respect to NSPS applicability is superseded and NSPS would not apply to units 2 and 3 by virtue of the proposed renovations so long as the capacity of these units after the completion of this work is no higher than demonstrated in the recent tests. This determination does not affect PSD applicability for these two units. If you should have any questions about the foregoing, please feel free to contact me. Thank you for your cooperation in this matter.

Sincerely,

Don R. Clay
Acting Assistant Administrator
for Air & Radiation

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN

UNITED STATES OF AMERICA,

Plaintiff,

And

NATURAL RESOURCES DEFENSE COUNCIL, INC. AND SIERRA CLUB,

Intervenor-Plaintiffs,

v.

DTE ENERGY COMPANY AND DETROIT EDISON COMPANY,

Defendants.

Civil Action No.
2:10-cv-13101-BAF-RSW

Judge Bernard A. Friedman

Magistrate Judge R. Steven Whalen

PLAINTIFF'S OPPOSITION TO DEFENDANTS' MOTION FOR PROTECTIVE ORDER

Exhibit 4

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION IX
215 Fremont Street
San Francisco. Ca. 94105

November 6, 1987

Robert T. Connery, Esq.
Holland & Hart
P. O. Box 8749
Denver, Colorado 80201

Re: Supplemental PSD Applicability Determination Cyprus Casa Grande Corporation Copper Mining and Processing Facilities

Dear Mr. Connery:

This is a supplemental determination regarding the applicability of prevention of significant deterioration (PSD) provisions under sections 160-169 of the Clean Air Act, 42 U.S.C §9 7470-7479, and EPA's PSD regulations, 40 C.F.R. S 52.21 to the above-referenced facility, located near Casa Grande, Arizona. This determination supplements the determination set forth in a May 27, 1987 Memorandum from John S. Seitz, Director, Stationary Source Compliance Division, EPA, and in my May 29, 1987 letter to Roger M. Ferland, Streich, Long, Weeks and Cardon, Phoenix, Arizona, attorney for Noranda Lakeshore Mines, Inc., which formerly controlled the Casa Grande facility. For the reasons discussed below, EPA today (1) reaffirms and incorporates by reference herein its earlier determination that reactivation of the Roaster/Leach/Acid (RLA) plant at the Casa Grande facility would constitute a major -new source within the meaning of Part C of the Clean Air Act and EPA's regulations issued thereunder; and (2) determines that even if the reactivated RLA plant would not be subject to PSD as a new source, the start-up would also constitute a major modification for PSD purposes. Accordingly, Cyprus Casa Grande Corporation (Cyprus) must obtain a PSD permit before beginning construction on any of the rehabilitation activities necessary for start-up of the RLA plant.

1. THE NEED FOR THIS SUPPLEMENTAL DETERMINATION

The earlier applicability determination by Mr. Seitz and myself was in response to requests by Noranda that focused exclusively on the question whether start-up of the RLA plant would render the facility subject to PSD as a major new source pursuant to EPA's shutdown/reactivation policy. My review of

the administrative record of that matter has confirmed that Noranda did not request *EPA to consider*, and *EPA* did not consider, whether the RLA plant would be subject to PSD upon reactivation as a major modification under the Act and the PSD regulations.

Following EPA's earlier determination, Noranda transferred its interest in the facility in question, including the RLA plant, to Cyprus. Cyprus then sought review of EPA's determination in the court of appeals. Cyprus Casa Grande Corp. v. EPA, No. 87-7322 (9th Cir.). In a Civil Appeals Docketing Statement filed with the Ninth Circuit on July 30, 1987, Cyprus identified under category I., "Issues to be Raised on Appeal," the following item:

> (2) Whether Petitioner's existing RLA plant has been subject to a "major modification," 40 C.F.R. § 52.21(b)(2), which would require a PSD preconstruction permit.

Thus, it is clear that if this matter is adjudicated by the court of appeals, it likely would raise issues beyond the scope of the consideration previously given by EPA and Noranda. This in turn raises the distinct possibility that litigation based on EPA's prior determination would not finally resolve the question of whether PSD applies to the start-up of the RLA plant, and that a subsequent round of judicial review would be necessary. Such a scenario would waste the resources of the court, EPA, and Cyprus, and would be contrary to Cyprus' stated interest in a quick resolution of environmental requirements for the project.

Accordingly, I believe it is appropriate at this time for EPA to determine whether the prospective start-up of the RLA plant by Cyprus would constitute a major modification for PSD purposes. This determination can be made on the basis of the record created in conjunction with the earlier reactivation determination by Mr. Seitz and myself. In addition, because that earlier determination was directed to Noranda in response to requests by that company, and in view of the evident controversy surrounding that determination, it is also appropriate to reconsider its application to Cyprus, as the new owner of the facility.

II. RECONSIDERATION OF WHETHER START-UP OF THE RLA PLANT IS SUBJECT TO PSD AS A MAJOR NEW SOURCE UNDER EPA'S REACTIVATION POLICY.

After reviewing the administrative record in this matter, I find no reason to disagree with EPA's longstanding shutdown/reactivation policy or its application to the set of circumstances presented by Noranda. Hence, EPA has no basis to change its earlier determination that start-up of the RLA plant would be subject to PSD requirements as a "reactivation," except insofar as the intervening transfer of the facility to Cyprus

would require a different result.

There is one key point that emerges from the transfer to Cyprus: It represents a further attenuation, both in the chain of ownership and in time, between shutdown of the RLA plant in 1977 and its prospective reactivation. A change in ownership does not, standing alone, render a stationary source subject to PSD provisions. See 40 C.F.R. § 52.21(b)(2)(iii)(g). However, the circumstances surrounding a change in ownership may be probative of whether the shutdown of the source should be deemed permanent, which is the key analysis that must be made under EPA's reactivation policy.

In this case, the inference that the shutdown was permanent *is* even stronger after the transfer to Cyprus than it was when Noranda was in control. This is so because by the time Cyprus gained control, the RLA plant had already been shut down for ten years, as opposed to two years when Noranda entered the scene. It addition, by the time Cyprus took over, the RLA plant was no longer in the state's emission inventory and did not possess operating permits. Thus, from the inception of Cyprus' ownership, every indication is that Arizona considered the facility to be permanently closed.

The transfer to Cyprus serves to strengthen the reactivation determination EPA made as to Noranda. Accordingly, *my* determination is that the start-up of the RLA plant by Cyprus would constitute a reactivation subject to PSD requirements as a new source.

III. WHETHER START-UP OF THE RLA PLANT IS SUBJECT TO PSD REQUIREMENTS AS A MAJOR MODIFICATION.

Even *if* the RLA plant were not subject to PSD as a new source under the reactivation policy, it would be subject anyway if the start-up were deemed to be a "major modification" within the meaning of the Act and 40 C.F.R. § 52.21.

The central thrust of the Clean Air Act's PSD major modification provisions is that significant actual emissions increases -- i.e., those which have substantial consequences for ambient pollution concentrations and, hence, the states' need to account for such pollution -- should be brought under PSD review. See Alabama Power Co. v. Costle, 636 F.2d 323, 400 (D.C. Cir. 1979). EPA followed the lead of the court in formulating the major modification provisions of the PSD regulations by focusing the regulatory definitions on actual emissions rather *than* a source vs potential to emit. See 45 Fed. Reg. 52700, col. 2-3. EPA also promulgated a narrow and limited set of exclusions in Its major modification regulations, but only to allow for routine changes in the normal course of business, where PSD

review would be unduly disruptive. See 40 C.F.R. §52.21(b)(2)(iii)(a) and (f).

Determining whether a major modification will occur at a particular source requires a sequential analysis of several factors. These factors are discussed in the preamble to the PSD regulations at 45 Fed. Reg. 52676, 52698 (August 7, 1980). The factors may be grouped under two basic questions: Would the start-up entail a "physical change in or change in the method of operation of a major stationary source"? If so, would the change "result in a significant net emissions increase of any pollutant subject to regulation under the Act"? See 40 C.F.R. § 52.21(b)(2)(i).

A. Physical Change or Change in the Method of Operation of the RLA Plant.

This requirement of a major modification is satisfied if either a physical or operational change would occur. In this case, the start-up would constitute both a physical and an operational change.

1. Physical Change.

The rehabilitation work necessary to make the Cyprus RLA plant operational would constitute a "physical change" at a major stationary source. */

EPA is aware of three reports addressing the rehabilitation work necessary to restart the RLA plant. By letter dated March 20, 1987, Noranda submitted the most recent evaluation of the minimum rehabilitation work necessary to start up the plant. The evaluation was prepared in March 1987 by E & C International ("E & CI") for the Cyprus Minerals Company and was based upon a three day inspection of the plant and review of equipment, support installation and existing piping, instruments and electrical switchgear. Noranda also submitted a June 1986 report prepared by the Ralph M. Parsons Company, also for Cyprus, which estimated "nominal cost" of $1,836,000 for refurbishing the RLA plant, plus "worst case add-on" costs of $906,000. However, the Parsons report was an "order of magnitude"

*/ As noted in Noranda's original Request for opinion dated September 12, 1986, sulfur emissions from the plant are 4.3 tons per day, equivalent to approximately 1500 tons per year, and thus greatly exceeding both the 100 ton per year threshold limit applicable to the primary copper smelter category or the 250 ton per year threshold for an "unlisted" major stationary source under 40 C.F.R. 52.21(a)(1).

scoping report, and based these cost estimates upon the Company's experience rehabilitating similar processing facilities rather than upon a detailed plant inspection. In addition, Noranda's original September 12, 1986 Request for opinion contained a February 1982 survey of rehabilitation work estimating a total cost of $347,000 and monthly maintenance reports for April-July 1982 indicating that some rehabilitation work occurred in this period. From among these three estimates of necessary rehabilitation work, the E & CI evaluation can most reasonably be relied upon. It is the most current and comprehensive and was based upon an actual plant inspection by outside consultants.

The E & CI report called for the following rehabilitation:

1) replacing of the thickener tanks in the roaster plant's Counter Current Decantation (CCD) circuit and repairing the "significantly" damaged foundation for the CCD thickener foundation;

2) installing new external insulation for both fluid bed roasters and gas cyclones;

3) "minor" refractory repairs in one roaster;

4) "minor" structural repairs and painting throughout the roaster plant's steel structure to address "significant" corrosion damage;

5) replacing a "moderate" amount of piping and valves in the roaster plant;

6) restoring or replacing of stainless steel pumps at the acid plant;

7) installing a pressure sand filter;

8) rebuilding the underflow pumps in the CCD circuit.

The E & CI report concluded that the work necessary to prepare the facility for operation could be done in three to four months at a cost of $905,000, without any contingency calculated. Contingency costs could significantly exceed this amount.*/ Even without factoring in contingent costs, $905,000 represents roughly 10% of the replacement cost of a new roaster. See Attachment 2 of March 27, 1987 letter from Roger Ferland.

*/ The E & CI report recommended adding on a 15% contingency for craft labor and materials and the Parsons report estimated $900,000 for "worst case" add-on costs. Information obtained during an EPA site visit confirmed that rehabilitation would require four months of double shifts.

Under the PSD definition of "major modification", a physical change does not include "routine maintenance, repair and replacement." 40 C.F.R. § 52.21(a)(2)(iii)(a). Although the E & CI report notes the good condition of the acid plant and characterizes some of the needed work as "minor" or "moderate," viewed as a whole, the minimum necessary rehabilitation effort is extensive, involving replacement of key pieces of equipment (e.g., the CCD thickener tanks, pumps, external insulation), and substantial time and cost. In an operating plant some of the individual items of the planned rehabilitation, e.g. painting, if performed regularly as part of standard maintenance procedure while the plant was functioning or in full working order, could be considered routine. Here, however, this and other numerous items of repair, as well as replacement and installation of new equipment, are needed in order for the RLA plant to begin operation. The fact that the plant requires four months of extensive rehabilitation work despite the adequate maintenance Noranda claims to have undertaken during the shutdown underscores the non-routine nature of the physical change that will occur at the plant. Thus, given the extent and nature of the repair, rebuilding and replacement of important equipment necessary to make the RLA plant operational, the rehabilitation work simply cannot be considered the "routine maintenance, repair and replacement" which is excluded from PSD review.

2. Change in the Method of operation.

The prospective start-up of the RLA plant after a ten-year shutdown would also constitute a change in the method of operation within the meaning of the PSD regulations.

As discussed above, the PSD major modification rules focus on changes in actual emissions. In general, changes at existing facilities that significantly increase actual emissions must undergo PSD-review. Yet, in adopting the PSD rules EPA also recognized that Congress did not intend to require preconstruction permits for a routine change in the hours or rate of operation. EPA believed that "such a requirement would severely and unduly hamper the ability of any company to take advantage of favorable market conditions." 45 Fed. Reg. 52704, col. 2. Accordingly, the PSD regulations exclude from the definition of physical or operational change "an increase in the hours of operation or in the production rate." 40 C.F.R. § 52.21 (b)(2)(iii)(f). However, I believe it is clear that in adopting this exclusion, EPA did not intend to remove PSD coverage in circumstances such as those presented by Cyprus. Rather, EPA limited this exclusion to situations where it would not interfere with a state's efforts in air quality planning when, in the preamble to the PSD regulations, it noted:

> At the same time, any change in hours or rate of operation that would disturb a

prior assessment of a source's environmental impact should have to undergo scrutiny.

45 Fed. Reg. 52704, col. 2-3. Thus, EPA disallowed the exclusion where the increase would not be allowed under a preconstruction permit. 40 C.F.R. § 52.21(b)(2)(iii)(f).

In this case, the RLA plant was not required to obtain a preconstruction permit when it was originally erected, because it predated the PSD program. Thus, the present situation is not squarely addressed by the relevant regulatory provision. Nevertheless, EPA's original intention to disallow the exclusion where it would "disturb a prior assessment of a source's environmental impact" leads me to conclude that the exclusion should not be applied here. This is so because our present assessment as well as that of the State of Arizona, is that the RLA plant in its current non-operating condition has no environmental impact. This is evidenced in part by the removal of the plant from the state's emission inventory and the surrender of operating permits. An additional factor is the simple physical fact that the RLA plant has had zero emissions for ten years. I believe that this result is a reasonable interpretation of the PSD regulations, and in keeping with the statutory purposes. (See in particular Clean Air Act section 160(3) and (5)).

3. Combination.

In any event, it seems undeniable, when one looks at both the physical and operational changes the company is proposing to make, that the reactivation constitutes a fundamental alteration in the character of the plant, one that is neither everyday nor routine. Nor is the reactivation deserving of special treatment because of a high frequency of changes at the facility or insusceptibility to event-by-event permitting.

B. Net Emissions Increase.

Whether a significant "net emissions increase" would occur is itself a multistep analysis. The first step is to determine whether the particular physical or operational change in question would itself result in a significant increase in "actual emissions." See §52.21(b)(3)(i)(a) and (b)(21). If so, the second step is to identify and quantify any other prior increases and decreases in "actual emissions that would be "contemporaneous' with the particular change and otherwise creditable. See § 52.21(b)(3)(i)(b). The third step is to total the increase from the particular change with the other contemporaneous increases and decreases. See § 52.21(b)(3)(i)(b). If the total would exceed zero, then a "net emissions increase" would result from the change. Each of these factors is analyzed below in the context of the prospective start-up of Cyprus" RLA plant.

1. Increase in Actual Emissions.

The start-up of the RLA plant would result in an increase in actual emissions within the meaning of the PSD regulations.

This calculation is made by comparing actual emissions as of a "particular date" -- i.e., immediately prior to the physical or operational change in question -- with the emissions from the source after the change is made. The regulations provide that actual emissions shall be the rate at which the source actually emitted the pollutant during the two-year period immediately preceding the particular date (the date of the change), unless EPA determines that a different two-year period is more representative of normal source operation. 40 C.F.R. § 52.21 (b)(21); see.also 45 Fed. Reg. 52718, col. 2.

In this case, the pollutant in question is sulfur dioxide (SO2), and emissions during the two-year period preceding start-up of the RLA plant are zero. I believe that this period is representative of normal source operations, since emissions have been zero during each of the last ten years while the plant has been shut down. Conversely, given this operational history, I do not believe that emissions during the one year in which the RLA plant was functioning is more representative of normal operations at the, Casa Grande facility. After start-up, emissions will be approximately 1500 tons per year. Thus, the entire amount of emissions after start-up will be considered an increase in actual emissions, and it is obviously significant. 40 C.F.R. § 52.21(b)(23)(i).

2. Contemporaneous Increases and Decreases in Actual Emissions.

No other Increases or decreases in actual *emissions* that would be contemporaneous with the start-up of the RLA plant have been brought to EPA's attention.

The regulations define the contemporaneous period as extending back five years from the physical or operational change, 40 C.F.R. § 52.21(b)(3)(ii), and no changes in emissions at the RLA plant have been made during this period because it has been shut down during this entire period. It should be pointed out in this regard that EPA chose the "fairly large" five-year contemporaneity period over a shorter period in response to industry commenters on the PSD regulations, who had urged that no time limit be placed on crediting of prior emissions decreases. The Agency believed five years to be adequate to accommodate a normal period for corporate planning. See 45 Fed. Reg. 52701, col. 1. Thus, EPA specifically considered and rejected an arrangement whereby an emissions decrease, such as that represented by the ten-year shutdown of the RLA plant, potentially could be credited upon start-up for purposes of determining whether a major modification would occur.

3. Net Emissions Increase.

Because the actual emissions increase from start-up of the RLA plant would be approximately 1500 tons per year, and there are no contemporaneous emissions increases or decreases, the net emissions increase from start-up would also be approximately 1500 tons per year. This amount is well above the 40 tons per year "significance" level for SO2. 40 C.F.R. § 52.21(b)(23)(i). Hence, the start-up would constitute a major modification within the meaning of the Clean Air Act and 40 C.F.R. § 52.21, and Cyprus must obtain a PSD permit prior to construction for this reason alone.

IV. SUMMARY.

Whether the prospective start-up of the RLA plant is viewed under EPA's reactivation policy or under its major modification regulations, I conclude that PSD requirements apply. This consistency of results is not surprising, because both the policy and the regulations address the same general principle that significant increases in actual emissions of air pollution, not already accounted for in air quality planning or involving significant capital investment, be reviewed under the PSD provisions of the Clean Air Act. I hope that in light of this supplemental determination, Cyprus will better understand EPA's insistence that the RLA plant undergo the normal PSD review procedures. I am also aware of Cyprus' desire to rehabilitate the RLA plant and recommence operations as soon as possible. EPA will do its best to accommodate this desire, consistent with its need to avoid undue disruption of its other PSD regulatory responsibilities.

Sincerely,

David P. Howekamp
Director
Air Management Division

cc: Lee Lockie
John Seitz

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN

UNITED STATES OF AMERICA,

Plaintiff,

And

NATURAL RESOURCES DEFENSE COUNCIL, INC. AND SIERRA CLUB,

Intervenor-Plaintiffs,

v.

DTE ENERGY COMPANY AND DETROIT EDISON COMPANY,

Defendants.

Civil Action No.
2:10-cv-13101-BAF-RSW

Judge Bernard A. Friedman

Magistrate Judge R. Steven Whalen

PLAINTIFF'S OPPOSITION TO DEFENDANTS' MOTION FOR PROTECTIVE ORDER

Exhibit 5

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

And **Civil Action No. 10-13101**

NATURAL RESOURCES DEFENSE COUNCIL, INC., AND SIERRA CLUB,

Proposed Intervener-Plaintiffs,

-v-

DTE ENERGY COMPANY AND DETROIT EDISON COMPANY,

Defendants.
_____/

PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION
BEFORE THE HONORABLE BERNARD A. FRIEDMAN
UNITED STATES DISTRICT JUDGE
100 U. S. Courthouse & Federal Building
231 West Lafayette Boulevard West
Detroit, Michigan 48226
WEDNESDAY, JANUARY 19TH, 2011

APPEARANCES:

For the Plaintiff: **Thomas A. Benson, Esq.**
Justin A. Savage, Esq.
Ellen Christensen, Assistant United States Attorney

APPEARANCES (CONTINUED)

For the Defendants:	**F. William Brownwell, Esq.** **Mark B. Bierbower, Esq.** **James W. Rubin, Esq.** **Michael J. Solo, Esq.** **Matthew J. Lund, Esq.**
ALSO IN APPEARANCE:	
For the Proposed Intervener-Plaintiffs:	**Nicholas Schroeck, Esq.**
Court Reporter:	Joan L. Morgan, CSR Official Court Reporter

Proceedings recorded by mechanical stenography.
Transcript produced by computer-assisted transcription.

I N D E X

PROCEEDINGS

W I T N E S S E S

LYLE CHINKIN

D.C. circuit has made clear that it must only apply to de minimis projects. And there's no way this could be considered de minimis.

If we could have image 7 which is Exhibit 2D to our original brief, this is the "Extreme Makeover: Power Plant Edition." That's what the local paper called it during the project. If we just talk about -- that's the $65,000,000 project as a whole. If we just talk about the pendant reheater or the economizer replacement alone each alone would cost more than $15,000,000. Each required the approval of the Detroit Edison -- I'm sorry, the DTE, the parent company, CEO, and neither had been done before. These types of projects just can't be considered routine. And it's certainly not routine if we look at the project as a whole just as the court did in Wisconsin Electric Power, Ohio Edison, and some of the other cases. Wisconsin Electric Power we refer to as WEPCO as you'll see in the papers.

And, in fact, not even Detroit Edison argues that it's routine if you look at the entire $65,000,000 project. And Detroit Edison doesn't argue it's routine even if you just look at the $30,000,000 in boiler upgrades which as I said before were all done to improve the availability of the project.

So let's turn now to the emissions side of the

equation. This is the second element of liability, was there an emissions increase? And there is no dispute that at the time of project, Detroit Edison expected emissions to go way up after the project. If we could Exhibit 2C up on the screen.

This is the letter --

THE COURT: Which one is that?

MR. BENSON: I'm sorry. This is 2C, Exhibit 2C.

So this is a letter that Detroit Edison sent to the state the day before it started the project. If we could have the last page of this.

This is the emissions calculation that they did before starting the project, or contemporaneous to starting the project. If you see and it's kind of hard to read, it's in the papers --

THE COURT: I have one right there.

MR. BENSON: Okay. As you see, Detroit Edison identifies a baseline period and says SO2 tons for about 30,000. It identified a projection period and said the SO2 tons expected in the future are about 35,000. And it calculated the difference. It turns out to be 3700 tons. This is just for SO2. They did the same calculation for Nox which is a little bit different.

So what they say is essentially, and we'll about more in a minute, that entire increase was unrelated to the

project and so they include that entire increase.

Now, we have to talk about whether that makes sense. The only question really before the Court is, is any of that increase that Detroit Edison expected related to this project? And to look at that another way, did the company in spending $65,000,000 to overhaul this unit expect to use it any more as a result. And the documents will show that the answer is yes, Detroit Edison's own documents will show.

Now, if this company -- if this unit runs enough to put out another 40 tons of SO2 or NOx that's enough to trigger a New Source Review. That's the threshold. And as you see here they're predicting an increase of 3700 tons of SO2 and 4,000 tons of NOx. And the company's own documents show that the company expected generations to increase as a result of the project. And that was -- that was the purpose and that was why these projects made sense to do financially. That's why they were approved.

So with that let's turn to Exhibit 13E. This was filed under seal with Detroit Edison's permission. They are allowing us to use it here in public but we are agreeing that we're not waiving their CVI claim here.

What this is, is the economizer -- a power point related to the replacement of Monroe Unit 2 economizer and it was put together as you see in February, 2009, more than

There's gypsum storage and loading to the flue gas desulfurization technology. So this a big operation. This is why the pollution control effort that Detroit Edison has had underway for several years is a two-billion dollar pollution control effort. This is real money.

If we can go onto the next slide. Now in each one of those boiler housings, as I said there's a boiler and there's a turbine generator. This is a schematic of boilers at the Monroe Power Plant. You saw some of this in Mr. Benson's presentation with the coal being introduced and combusted to heat water. The water passes through tubes in the boiler walls, up through various tubes components where the water turns to steam, the steam then goes into the turbine generator to generate electricity.

So the components that the Government has focused on in its preliminary injunction motion includes the pendant reheater up here and the economizer down here. There also was replacements of about four percent of water wall tubes as part of this project.

Now, given what goes on in an utility boiler they are incredibly -- these tubes are subject to high temperatures, high pressures, there's erosive, and corrosive atmospheres. So one of the most common failure mechanisms in an utility boiler is actually tubes wear out, and tubes have to be replaced in order to continue

operating the boiler in a reliable and safe manner.

Now, you see beyond the boiler the SCR, and other control technology and the FGD. The SO2 scrubber would have to be built to accommodate the weathered exhaust stack that comes from that FGD technology.

Now, if we could have the third slide, and this merely to give your Honor --

THE COURT: Just going back one second. I think part of the argument from the Government, if you only did the tubing they probably wouldn't be here, but they say adding the other things to replace is probably the thing that pushes it over or maybe. I don't think -- I'm not even sure they even go that far, they didn't say the tubing, but certainly they're indicating the other two components probably trigger.

MR. BROWNWELL: I heard that as well, your Honor, because when you go through their preliminary injunction motion and I'm referring to pages 10 to 11, and pages 19 to 20 of their preliminary injunction motion they focused on the economizer and the reheater as a major capital project instead of modifications, and not on all the other stuff that goes on during the outages. If one looks at the other stuff that comes under the outages it was with pumps and valves, and gaskets and other things that are normally replaced. So when we saw the Government's preliminary

injunction motion we figured they would focus on what the big capital projects are. But this whole project together is something that's routine maintenance and replacement.

What we have here -- I'll come back to that in just a minute, your Honor. I wanted to give you just an overview on Slide 3 of what this plant site looks like. This is a Google earth image from 2007, and it shows you just how big this generating station is. It's about an eight-billion dollar generating station. It covers 1200 acres with coal, shipment, supply and handling. And these are the boilers we talked about right in here, four, three, one and two.

And you'll note in 2007, this FGD, SO2 scrubber, was still under construction for Units 3 and 4. And this is the area where the flue gas desulfurization is going from Units 1 and 2, and where the SCR, the N0x scrubbing technology, is going to go for Unit 2.

So this shows all of the other ancillary facilities, limestone handling, storage, waste water treatment, ash, ponds and treatment.

By way of a context this is a parking lot here. And you can see just how huge this facility is given the size of the parking lot and the small cars there. But that just gives you a sense for how huge facility is.

Now, these facilities, of course, these boilers,

are extensively regulated under the Clean Air Act, the Air Quality Standards, the State Implementation Plan that the state set to implement those health and welfare type standards. There's a whole slew of Clean Air Act regulations in place that these plants comply with, and this station complies with it even before this project even took place.

THE COURT: Let me ask you one other question.

MR. BROWNWELL: Yes, your Honor.

THE COURT: If Unit 3 -- or any unit, had you ever replaced the secondary heater or the reheater, the pendant reheater?

MR. BROWNWELL: I believe Mr. Golden in his declaration goes through the various tube replacement projects that have been done.

THE COURT: But as to those particular components, those two --

MR. BROWNWELL: Those particular components have been repaired and replaced with other units. I believe in the Exhibit 13E and 13F that the Government referred to, it indicates there has been repaired and replacement.

THE COURT: At that time there was some discussion between them and you on whether or not it triggered or didn't trigger.

MR BROWNWELL: There was -- there has been, of

driving swings in generations in doing these forecasts. So when the company filed its pre-project notification as it's done with respect to all the major outages with the state agency, it told the state agency that any increase generation in this 2010 run was due to changes in the fuel wholesale prices and other things but not the project. That, your Honor, we submit is a reasonable engineering judgment.

But to build on that once the Government started raising questions the company said to the Government, okay, we will commit to keep emissions from Unit 2 at pre-project levels going forward. They offered this in a June 23rd letter at the end of the project and your Honor had put that in an order so there cannot be any increase going on over the pre-project level for any reason. So what we have at this point is a reasonable projection before the project, that there would be no emissions increases, no emissions increases in reality, and there cannot be any emissions increases going forward under the Court's order.

So this both confirms that there can't be a modification here because there's not an emissions increase as a result of the project and confirms that there is no irreparable harm.

That these projects, these two replacement projects are not modifications is also consistent with the

recent decision in the Cinergy case where the jury found 10 to 14 projects were not modifications, and then the Seventh Circuit rejected the Government's methodology with respect to the remaining projects. So we have examples out there where the courts have found tube replacement projects are not modifications because they don't increase emissions.

Let me talk for a minute about routine replacement because that is another reason why it's reasonable to conclude that these projects are not modifications.

EPA argues potentially that these projects cannot be routine because they're really big. But these generating stations are really big. If we can have the next slide.

This is based on information from the attachments from Chatfield's declaration. This is roughly an 8 billion dollar generating station. Monroe Unit 2 is over a 2-billion dollar replacement cost generating unit. This project even at 65 million dollars is a small fraction of the replacement costs of the Monroe 2 Unit.

Now, when the tube replacements were addressed recently in a case brought against the Tennessee Valley Authority, what did the district court of North Carolina say: There are four factors on what the Government issued back in September of 1988, that are looked at to determine

whether or not a project is routine repair and replacement. The nature and the extent of the project. The purpose. The frequency, and the costs. And there's been some controversy during the course of EPA's enforcement actions whether those factors are considered in the context of the unit or the industry. We believe that because the agency said back in 1992, in the Federal Register that the industry context is what is relevant. Those factors are evaluated in the context of the industry and is what, in fact, most courts have adopted.

So we see in this case which is National Parks Conservation Association versus TVA in the Middle District of Tennessee, the court looks to the nature and extent of the economizer replacement. And the court said the economizer replacement -- and those are big projects, they were replacing all the tubes, it necessitates the use of cranes, monorails, extensive rigging system, a large number of outside craftsmen, the approval of the board of directors, classified as capital improvements, but given the size of these generating units while it's not a small task it's not extraordinary, and the court noted that in that record there was evidence of lots of other projects, repair and replacement projects of this magnitude. As to frequency the court said it's common in the industry to do these projects. As to costs, the costs were high and the

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN

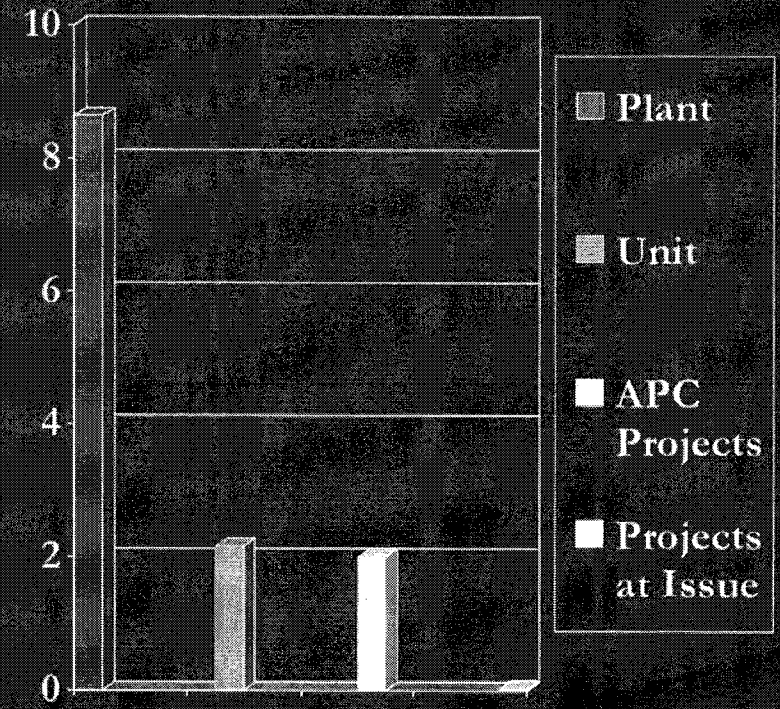
UNITED STATES OF AMERICA, Plaintiff, And NATURAL RESOURCES DEFENSE COUNCIL, INC. AND SIERRA CLUB, Intervenor-Plaintiffs, v. DTE ENERGY COMPANY AND DETROIT EDISON COMPANY, Defendants.	Civil Action No. 2:10-cv-13101-BAF-RSW Judge Bernard A. Friedman Magistrate Judge R. Steven Whalen

PLAINTIFF'S OPPOSITION TO DEFENDANTS' MOTION FOR PROTECTIVE ORDER

Exhibit 6

Cost of Monroe Unit 2 Work

- Less than 1% of the replacement value of the plant
- Less than 4% of the replacement value of the unit
- Less than 4% of the cost of the Monroe pollution control projects



Second Declaration of Ethan Chatfield, Ex. 13A at 37; Declaration of Skiles W. Boyd ¶ 8.

United States v. Detroit Edison et al. (E.D. Mich.)

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN

UNITED STATES OF AMERICA,

Plaintiff,

And

NATURAL RESOURCES DEFENSE COUNCIL, INC. AND SIERRA CLUB,

Intervenor-Plaintiffs,

v.

DTE ENERGY COMPANY AND DETROIT EDISON COMPANY,

Defendants.

Civil Action No.
2:10-cv-13101-BAF-RSW

Judge Bernard A. Friedman

Magistrate Judge R. Steven Whalen

PLAINTIFF'S OPPOSITION TO DEFENDANTS' MOTION FOR PROTECTIVE ORDER

Exhibit 7

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January 31, 2011

FILE NO: 55788.000042

Via Electronic Mail

Thomas A. Benson
U.S. Department of Justice
Environment and Natural Resources Division
Enforcement Section
P.O. Box 7611
Washington, DC 20044-7611

Re: *United States v. DTE Energy Co., et al., No. 10-13101*

Dear Tom:

This follows our telephone discussions concerning your letter of January 24, 2011 and the Court's January 27, 2011 Scheduling Order and provides Detroit Edison's response regarding scheduling and discovery limits for the Monroe Unit 2 liability trial.

A. Issue to Be Tried.

While we agree that the Court has set the case for trial on liability only, Detroit Edison does not agree that the issue to be tried is "whether the March-June 2010 project at Monroe Unit 2 constituted a modification." Among other things, the 2010 outage at Monroe Unit 2 involved projects that were separately approved and justified, and EPA's attempt to aggregate these projects into one project is contrary to law and contrary to EPA's June 2010 NOV.

B. Initial Disclosures.

Pursuant to the Court's January 27, 2011 Scheduling Order, the parties will exchange witness lists on February 15, 2011.

C. Discovery Plan.

1. Fact Discovery.

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Written Discovery. Detroit Edison agrees to the limitation of 50 requests for production of documents, 50 interrogatories, and 50 requests for admission per side.[1] However, Detroit Edison cannot commit to reviewing its Section 114 responses and supplementing them as part of this enforcement action. As you know, the Federal Rules of Civil Procedure apply to this action, and there is no obligation under those rules to supplement responses previously provided to EPA under Section 114.

Fact Depositions. Detroit Edison believes that 20 fact depositions per side is excessive, especially when trial is set to begin in less than four months. Given the time constraints and the presumptive limit of 10 depositions per side set forth in Federal Rule 30(a)(2)(A)(i), Detroit Edison believes that 8 fact depositions per side is appropriate.

Plant Inspection. Detroit Edison expects that any EPA inspection would be for discovery purposes only, governed by Federal Rule 34(a)(2), and subject to conditions agreed upon by the parties. In addition, Detroit Edison proposes that the parties suggest a site visit by Judge Friedman.

Witness Lists. Detroit Edison agrees with EPA's proposal.

2. Expert Discovery.

Expert Reports. Detroit Edison agrees that declarations submitted by the parties in connection with EPA's motion for preliminary injunction shall serve as expert reports. However, to the extent not already included in their declarations or otherwise provided, Detroit Edison believes the parties' experts should be required to disclose the information set forth in Rule 26(a)(2) in their supplemental reports. Likewise, Detroit Edison believes that the Federal Rules of Civil Procedure, including Rule 26(a)(2), should apply to any expert that has yet to be disclosed, and that disclosures with respect to any such experts should be staggered to allow responsive disclosures, if necessary.

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[1] Detroit Edison assumes that EPA's "side" includes Plaintiff-Intervenors. If we are mistaken, Detroit Edison will need to reconsider its position regarding EPA's entire proposal regarding discovery limitations.

HUNTON& WILLIAMS

Expert Depositions. Your letter does not contain a proposal regarding expert depositions. Detroit Edison presumes that the Federal Rules of Civil Procedure will apply to those. Please let us know if EPA has a different view.

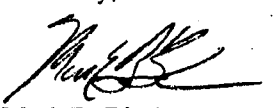
D. Discovery and Trial Disclosure Deadlines.

Detroit Edison generally agrees with the proposed discovery and trial disclosure deadlines, as clarified above, but reserves the right to seek modification of the schedule should the need arise. In addition, EPA's proposal does not address whether the deadline to file responsive or reply briefs is triggered by service or filing of the applicable brief. *See, e.g.*, Fed. R. Civ. P. 6(d). Detroit Edison suggests that such deadlines be triggered by service, and e-mail service is acceptable to both sides (as before). Detroit Edison is unclear as to what EPA means by "Substantive motions" on page 2 of your January 24 letter. If you could clarify what EPA means by the use of that term, Detroit Edison will respond on that proposed deadline.

Finally, we have proposed to request permission to equip the courtroom with video monitors and split the cost if granted, and we understand that you will get back to us on that idea.

Thank you for your cooperation.

Sincerely,



Mark B. Bierbower

cc: Counsel of record